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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 AMY DAVIS,

12 Petitioner,

13 vs.

14 JAVIER CAVAZOS, Warden, et al.,

15 Respondents.

CASE NO. 11cv1193-H (MDD)

REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE RE:
PETITION FOR WRIT OF HABEAS
CORPUS
[Doc. No.1]

16 **I. INTRODUCTION**

17 This Report and Recommendation is submitted to United States District Judge Marilyn L.
18 Huff pursuant to 28 U.S.C. § 636(b) and Local Civil Rule H.C.2 of the United States District Court
19 for the Southern District of California. After reviewing the Petition (Doc. No. 1), Respondent's
20 Answer and Memorandum of Points and Authorities in support thereof ("Answer") (Doc. No. 7),
21 Petitioner's Traverse (Doc. No. 18), and the supporting documents and pertinent state court
22 lodgements, the Court recommends the Petition be **DENIED** for the reasons stated below.

23 **II. PROCEDURAL HISTORY**

24 On June 1, 2011, Amy Davis ("Petitioner"), a California state prisoner, filed a Petition for
25 Writ of Habeas Corpus by a Person in Custody pursuant to 28 U.S.C. § 2254. (Doc. No. 1). In the
26 request, Petitioner alleges that she received ineffective assistance from both her trial and
27 sentencing counsel because of their failure to investigate and present a theory of defense. (Doc.
28 No. 1). On September 7, 2011, Respondents filed an Answer. (Doc. No. 7). Petitioner filed an

1 untimely Traverse on February 2, 2012. (Doc. No. 18).

2 Petitioner was sentenced to life in prison without possibility of parole on January 11, 2008.
 3 On June 22, 2009, the California Court of Appeal (Fourth District Division One) denied
 4 Petitioner's appeal on grounds unrelated to her ineffective assistance of counsel claim. The
 5 California Supreme Court denied review on September 9, 2009. (Lodgment Nos. 4, 7, 8).
 6 Petitioner then filed a request for writ of habeas corpus, alleging ineffective assistance of counsel,
 7 which was denied by the California Supreme Court on May 18, 2011. (Lodgement 11).

8 **III. STATEMENT OF FACTS**

9 28 U.S.C. § 2254(e)(1) provides: "[A] determination of a factual issue made by a State
 10 court shall be presumed to be correct." Petitioner has "the burden of rebutting the presumption of
 11 correctness by clear and convincing evidence." *Id.*; see also *Jeffries v. Wood*, 114 F.3d 1484, 1499
 12 (9th Cir. 1997) (overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320 (1997)) (stating that
 13 federal courts are required to "give great deference to the state court's factual findings.")
 14 Accordingly, the following facts are taken from the California Court of Appeal's opinion:

15 The victim, 57-year-old Theodore Salanti, and the defendant, 24-year-old Davis, were
 16 friends. Although the two apparently did not have a sexual relationship, Salanti's
 17 friends believed that he wished that Davis was his girlfriend. Salanti often gave
 Davis generous sums of money, provided her with drugs, and allowed her to use his
 car. Davis was a frequent guest at Salanti's condominium.

18 Salanti was a drug dealer and user. He was known to keep large quantities of drugs,
 19 including methamphetamine and marijuana, in a safe located in his
 bedroom/workroom, and in other places around his condominium. He also was
 20 known to keep large sums of cash—often between \$20,000 and \$100,000—in his home.
 He kept drugs and cash in a home safe, and would sometimes hide cash under his
 21 carpet. Salanti often bragged about his money.

22 Davis stole approximately \$30,000 from Salanti at one point approximately a year
 before Salanti was killed. According to Davis, she offered to give the money back to
 23 Salanti, but he allowed her to keep it, told her not to steal from him again, and said
 that if she ever needed anything, she could just ask him for it.

24 ***Salanti's Disappearance***

25 One of Salanti's closest friends last saw Salanti alive on Friday, September 23, 2005.
 26 In the very early morning hours of September 23, Salanti sent an e-mail to Davis in
 which Salanti said, "Hey, I'm just forgetting about you. You [sic] back with your
 27 ex, so don't call or come over." Davis went to Salanti's home on Saturday, September
 24.

28 At 3:12 p.m. on September 24, Davis went to a 7-Eleven store near Salanti's
 condominium and bought a Slurpee, a Gatorade, M & M's, Blistex, and cigarettes.

1 She paid with a \$100 bill.

2 At 4:00 a.m. on September 25, Davis went to a Sav-On drugstore and purchased a
3 "Wonder Wheeler" [cart]. Davis also returned to the 7-Eleven nine different times
that day, and bought, among other things, various cleaning products.

4 At about 5:30 p.m. on September 26, a locksmith called to follow up with Salanti
5 regarding work that the locksmith had begun on Salanti's car on either September 23
6 or 24. The locksmith had made a number of unsuccessful attempts to reach
7 Salanti by telephone during the intervening days. However, on the evening of
September 26, a woman answered Salanti's telephone and told the locksmith that
Salanti had gone out to get something to eat.

8 Salanti's neighbors saw Davis in the condominium complex and driving Salanti's car
9 between September 23 and September 28. One neighbor saw Davis wearing a
10 bathing suit. Davis appeared to be walking to or from the complex pool. On
September 28, Davis was pulled over by California Highway Patrol officers while she
was driving Salanti's car.

11 *Discovery of Salanti's Body*

12 On Thursday, September 29, Salanti's friends called 911 after they had been unable to
13 reach Salanti for a number of days and had observed things that they thought were
14 suspicious inside his condominium. Fire officials responded to the call and
15 pried open the front door. Once the door was open, they smelled the odor of a
decomposing body. The fire officials discovered Salanti's body inside a suitcase in
the entryway. The suitcase was wrapped in duct tape and covered with a comforter
and a sleeping bag.

16 Salanti's face, including his nose and mouth, was covered in duct tape. His hands
17 were tied behind his back with rope. There was duct tape around Salanti's right ankle.
Two of his pants pockets were pulled inside out. His empty wallet was found in the
master bedroom.

18 The medical examiner determined that Salanti had been dead for several days before
19 his body was discovered. The cause of death was determined to be "homicidal
20 violence including asphyxiation." Salanti's body was bruised, and he had six
fractured ribs. Salanti's body tested positive for amphetamines, fentanyl and
marijuana.

21 Police found Davis's DNA on several items inside Salanti's condominium, including
22 cigarette butts, a plastic cup, a latex glove found in the trashcan, a knife handle, and a
box cutter. A piece of latex glove with Davis's DNA on it was found attached to duct
23 tape that matched the duct tape on Salanti's body. Davis's fingerprints were found all
over the condominium.

24 At approximately 1:30 p.m. on Saturday, September 24, someone performed an
25 internet search on Salanti's computer seeking information concerning Liberty floor
safes. Additional searches were performed between 4:00 p.m. and 10:00 p.m. that
26 day regarding how to locate and open safes. On Tuesday, September 27, between
1:00 p.m. and 2:00 p.m., two searches were conducted on Salanti's computer. One
27 involved how to get rid of the odor from a decaying body, and the other involved how
to find a floor safe and open it.

28 In Salanti's car, investigators found papers that contained Salanti's banking
information, blank checks, and documents regarding safes.

1 ***Davis' Initial Statements to Police***

2 On October 1, 2005, San Diego police officers went to Davis's mother's home where
3 they met with Davis. Davis agreed to accompany the officers to the police station for
4 an interview. On the way to the station, Davis told the officers that she had been
5 driving Salanti's car, and took them to the car. During the interview, Davis said that
6 she had last seen Salanti alive on Thursday, September 22. She claimed that on that
7 day, she borrowed Salanti's car because her car had broken down. Davis denied any
8 knowledge of Salanti's death. She admitted to detectives that in the past she had
9 stolen \$30,000 from Salanti. According to Davis, Salanti had forgiven her.

10 Davis told the detectives that Salanti usually kept more than \$100,000 in his
11 condominium, and that he kept money in the safe in his home, and also hid money in
12 other places throughout the home. Davis said that she knew the combination to
13 Salanti's safe because he had given it to her. Detectives noticed that Davis had
14 scratches on both of her hands.

15 On October 2, the day after Davis first spoke to detectives, Davis called detectives
16 and left a voicemail message in which she indicated that she had more information for
17 them. Detectives met with Davis on October 4. She told the detectives that she had
18 failed to tell them something on the previous occasion when she spoke with them
19 because she was scared. She said that she had called the detectives to ask to speak
20 with them again after she told her brother and mother "everything." Davis told the
21 detectives that she knew that two men had been involved in Salanti's death.
22 According to Davis, two men who were armed with a knife approached her outside of
23 Salanti's condominium while Salanti was gone. The men entered Salanti's
24 condominium and stole his marijuana from a kitchen cupboard. The men then forced
25 Davis to sit in the room where Salanti's desk was located. She heard Salanti come in,
26 and she could hear the two men beating him. She tried not to listen, and claimed that
27 she did not know what else had happened. Davis told the detectives that she ran
28 outside, and that the two men told her to drive them to the intersection of El Cajon
29 Boulevard and Utah Street. She asked the men whether they had hurt Salanti, and
30 they assured her that they had not. One of the men said that he wanted Salanti's
31 computer, so they were going to come back to Salanti's condominium. The men told
32 Davis not to tell anyone about what had occurred.

33 Davis returned to Salanti's condominium alone, and sat outside. She assumed that
34 this is when Salanti's neighbors saw her. However, Davis did not know on which day
35 this occurred. She explained she "was using" at the time. According to Davis, the
36 men returned to Salanti's condominium two more times. They repeatedly threatened
37 her and forced her to search the condominium for hidden money and drugs. After
38 they left the last time, Davis entered the condominium. She did not see Salanti and
39 did not know where he was. However, later during the interview, Davis said that she
40 found Salanti's lifeless body in a closet while the two men were in another room. She
41 said that she did not know how Salanti's body ended up in the suitcase.

42 Davis alternatively claimed that the cart she purchased was for laundry, trash, or for
43 "everything else" the men were going to steal from Salanti's place. Davis said that
44 she was scared to call the police because the men were in a gang and could find her if
45 she said anything to the police. Davis eventually admitted that she had taken drugs
46 from Salanti's safe. She said that there had been a plan, and that she was going to
47 "get a cut of money" and drugs for helping the men.

48 Davis said that after this all happened, she went to a friend's house. Davis told her
49 friend what had happened and said that she was scared of the men.

1 ***Davis' Arrest***

2 On October 12, 2005, police arrested Davis. Davis waived her *Miranda* rights and agreed
3 to speak with detectives again. Davis reiterated that she did not know the two men, and
4 said that they had approached her while she was outside Salanti's condominium, smoking.
5 The men told her that they knew who she was, and said that they "knew [Salanti]'s whole
6 situation." The men told Davis that they wanted to go inside Salanti's home, and said,
7 "[W]e're here for a purpose and you already know what the purpose is and just work with
8 us and I'll even give you a little bit of money."

9 According to Davis, the men went inside and found Salanti's marijuana. They told
10 Davis to close the blinds. The men asked Davis to open the safe, which she did, but
11 there was no cash in it. After a while, Davis thought that the men had left, and she
12 played dominos on the computer. She went outside, and the two men returned. They
13 forced her to go inside and then began to search for something in the kitchen. Davis
14 went back into the office and started playing dominos again. Davis said that she did
15 not know when Salanti came home, and that she did not hear him say anything to the
16 men when he returned. She eventually heard a "ruckus" and then heard "kind of like
17 a moan." Davis was surprised that Salanti had come into the home without her
18 having seen him, since she had been watching out the office window for him to
19 return.

20 After she heard the noises, Davis "knew immediately that they beat [Salanti] up."
21 She "just froze inside." One of the men came into the room where Davis was and
22 told her that "everything [was] gonna be their way now." Davis started to cry and
23 asked the men where Salanti was. The men told Davis that they had beat up Salanti,
24 but said that he was fine. They ordered her to search the house. Davis thought that
25 the men were holding Salanti hostage and that if she helped them, they would leave.
26 Davis proceeded to search the condominium for money. She eventually told the men
27 that she could not find anything, but they told her to "try harder." Davis said that the
28 men sent her to Sav-On to buy a cart so that the men could load it up with the things
29 they wanted to take from Salanti's condominium.

30 Davis told police that she did not know that the men had killed Salanti at the time she
31 was searching for the money. She eventually found Salanti's body in the closet while
32 she was searching the bedroom. Davis thought one of the men might have seen her
33 looking in the closet where she found Salanti's body, but she tried to pretend that she
34 did not know that Salanti was dead. The men ordered her to take clothes out of a
35 suitcase, but she did not think that they were going to put Salanti's body in it. Davis
36 said that she did not see the men put Salanti's body in the suitcase, but admitted that
37 she helped them put duct tape around the suitcase.

38 The men had Davis drive them to El Cajon Boulevard and drop them off. After she
39 dropped them off, Davis returned to Salanti's condominium. She estimated that the
40 entire ordeal lasted approximately two days. Davis remained at Salanti's
41 condominium until at least Tuesday, September 27.

42 ***Davis' Trial***

43 Davis testified at trial. She continued to maintain that the two men who approached
44 her outside Salanti's condominium had a knife, and that they had threatened her. She
45 said that she did not know that Salanti had been killed until after she dropped off the
46 men near El Cajon Boulevard. Davis testified that she had not found Salanti's
47 body in a closet, but rather, that she found the body, already in the suitcase, after she
48 returned from dropping off the two men.

At trial, Davis admitted that she had lied to the detectives when she told them that the men had directed her to look for money and drugs. She said that she had not opened the safe while the two men were still at the house, but after they had left. Davis acknowledged that she, alone, had caused all of the damage that had been done to Salanti's condominium. She explained that after she found Salanti dead, she did not know where to go. She was high on methamphetamine and thought that Salanti might have hidden money in a secret safe. Davis thought that if she found the money, she "could just run, basically, because [she] was freaked out." Davis also admitted that she was the one who had dragged the suitcase with Salanti's body inside to the front entryway of the condominium. When asked why she had done that, Davis replied, "I was trying to cover everything up. I thought that I could make everything just kind of go away. That's why there was a blanket on it. I didn't know what I was doing, to be honest. I just-I was freaked out. I didn't know what to do. I didn't-there was no way I was going to call the authorities, and I had nobody. I didn't know what to do, so I made a lot of stupid mistakes."

Davis disclaimed having helped the two men put duct tape on Salanti's body, and retracted her earlier admission to detectives that she had handed strips of the duct tape to the men. She admitted that she had used duct tape on a wall in the dining room and that she had put duct tape over the blanket that was found on top of the suitcase.

Davis testified that she did not intend to steal from Salanti when the men approached her on Saturday, September 24, or when she let the men into the condominium. She said that she also did not intend to steal from Salanti when she heard the men beating him up. Davis stated that she never had an agreement with the men for a "cut" of whatever was found in exchange for her participation in a scheme to steal from Salanti. She said that the reason she did not call the police after the incident was because Salanti had been robbed a number of times and had never reported any of the crimes to authorities. She said that Salanti had indicated to her that he did not want such incidents reported to the police.

Dr. Alex Stalcup, medical director of the New Leaf Treatment Center in Lafayette, California, testified as an expert on methamphetamine use. Dr. Stalcup opined that during her interviews with police, Davis was going through the "crashing phase of the methamphetamine binge cycle." Dr. Stalcup testified that Davis's conduct after Salanti's death was consistent with that of a person on a methamphetamine binge or in the "tweaking" phase, which usually occurs 18 to 24 hours "into the binge, [and is a state] in which they maintain intoxication." According to Dr. Stalcup, individuals who are tweaking are "able to think, but they're very very, high."

(Lodgment 7 at 3-12) (footnotes omitted).

IV. STANDARD OF REVIEW

28 U.S.C. § 2254(a), provides the scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Here, the Petition was filed after the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Under 28 U.S.C. §

1 2254(d), as amended by AEDPA:

2 (d) An application for a writ of habeas corpus on behalf of a person
3 in custody pursuant to the judgment of a State court shall not be granted with respect
4 to any claim that was adjudicated on the merits in State court proceedings unless the
adjudication of the claim -

5 (1) resulted in a decision that was contrary to, or involved an unreasonable
6 application of, clearly established Federal law, as determined by the Supreme
Court of the United States; or

7 (2) resulted in a decision that was based on an unreasonable determination of the
8 facts in light of the evidence presented in the State court proceeding.

9 When determining what constitutes “clearly established federal law” under § 2254(d)(1),
10 federal courts look to United States Supreme Court holdings at the time of the state court’s
11 decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). A state court’s decision is “contrary
12 to” clearly established United States Supreme Court precedent if (1) the state court applies a rule
13 different from the governing law set forth in Supreme Court cases, or (2) the state court confronts
14 a set of facts that are materially indistinguishable from a Supreme Court case, but still reaches a
15 different result. *Williams v. Taylor*, 529 U.S. 362, 405-06, 412 (2000); *Lockyer*, 538 U.S. at 73.
16 A state court decision does not have to demonstrate an awareness of clearly established Supreme
17 Court precedent, so long as neither the reasoning nor the result of the state court decision
18 contradict such precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002).

19 A state court decision may involve an “unreasonable application” of Supreme Court
20 precedent “if the state court identifies the correct governing legal rule from [the Supreme] Court’s
21 cases but unreasonably applies it to the facts of the particular state prisoner’s case.” *Williams*,
22 529 U.S. at 407. Alternatively, an unreasonable application may be found “if the state court
23 either unreasonably extends a legal principle from [Supreme Court] precedent to a new context
24 where it should not apply or unreasonably refuses to extend that principle to a new context where
25 it should apply.” *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). An unreasonable application
26 of federal law requires the state court decision to be more than incorrect or erroneous. *Lockyer*,
27 538 U.S. at 76. Instead, the state court’s application must be “objectively unreasonable.” *Id.*
28 Petitioner bears the burden of proving the state court acted in an unreasonable, or contrary
manner. *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002).

1 The United States Supreme Court has held that “[w]here there has been one reasoned state
 2 judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting
 3 the same claim rest upon the same ground.” *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).
 4 When the state court does not supply reasoning for its decision, an independent review of the
 5 record is required to determine whether the state court clearly erred in its application of
 6 controlling federal law. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). This independent
 7 review is not *de novo*. *Id.* Although the federal court independently reviews the record, it defers
 8 to the state court’s ultimate decision. *Pirtle v. Morgan*, 313 F.3D 1160, 1167 (9th Cir. 2002).

9 Therefore, the Court will conduct an independent review of whether the California
 10 Supreme Court’s decision to deny Petitioner’s request for writ of habeas corpus was objectively
 11 unreasonable under United States Supreme Court jurisprudence.

12 V. DISCUSSION

13 Petitioner claims that her defense counsel at trial and sentencing were ineffective because
 14 they failed to (1) conduct a competent investigation of a possible Battered Woman Syndrome¹
 15 (“BWS”) defense; (2) schedule a BWS evaluation by a qualified expert; and (3) present known
 16 BWS evidence at trial and sentencing. Petitioner asserts that had her trial and sentencing counsel
 17 presented this evidence, her trial may have had a different outcome and her sentence might have
 18 been reduced.

19 In their Answer, Respondents asserts that Petitioner’s ineffective assistance of counsel
 20 claim fails because a BWS defense is not applicable to the facts of the case and would not have
 21 been admissible at trial. (Doc. No. 7 at 11). Respondents contend that Petitioner’s trial and
 22 sentencing counsel could not be considered ineffective for failing to present an irrelevant defense.
 23 (Doc. No. 7 at 14). Consequently, Respondents assert that the California Supreme Court properly
 24 denied Petitioner’s request and the Petition should be denied. (Doc. No. 7 at 15).

25 A federal court may not grant a state prisoner’s habeas application unless the relevant state-
 26 court decision “was contrary to, or involved an unreasonable application of, clearly established

27
 28 ¹ Both Petitioner and Respondents use the term “Battered Woman Syndrome” as it was used
 at trial. Although the term is now referred to as “Intimate Partner Battering,” the Court will continue
 to use the term “Battered Woman Syndrome” or “BWS” to be consistent with the Petition and Answer.

1 Federal law, as determined by the Supreme Court of the United States.” (AEDPA), 28 U.S.C. §
 2 2254(d)(1) (2006). Here, the California Supreme Court summarily denied Petitioner’s habeas
 3 application without comment. (Lodgement 11). Since there is no reasoned opinion in Petitioner’s
 4 case denying the claims, the Court must undertake an independent review of the record to
 5 determine whether the state court’s denial was objectively reasonable.

6 **A. The *Strickland* Standard**

7 The Sixth Amendment, as made applicable to the states through the Fourteenth
 8 Amendment, entitles a criminal defendant to the effective assistance of counsel. U.S. Const.
 9 amends. VI, XIV. In *Strickland v. Washington*, 466 U.S. 687, 688 (1984), the Court held that the
 10 right to the effective assistance of counsel is denied when a defense attorney’s performance falls
 11 below an objective standard of reasonableness and thereby prejudices the defense. In such cases,
 12 a petitioner is required to overcome the “presumption that, under the circumstances, the
 13 challenged action ‘might be considered sound trial strategy[,]’” and must show both
 14 incompetence and prejudice. *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).
 15 “Judicial scrutiny of a counsel’s performance must be highly deferential” and there should be a
 16 strong presumption that counsel’s performance falls within “the wide range of reasonable
 17 professional assistance.” *Id.* A showing of prejudice must assert with reasonable probability that
 18 but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 694.

19 *Strickland*’s requirements also apply to sentencing counsel. *Lang v. Cullen*, 725 F.Supp.2d
 20 925, 1027 (2010) (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)). Just as a court evaluates
 21 ineffective assistance during the trial phase, “we must avoid the temptation to second-guess
 22 [sentencing counsel’s] performance or to indulge ‘the distorting effects of hindsight.’” *Mayfield v.*
 23 *Woodford*, 270 F.3d 915, 927 (2001) (quoting *Strickland*, 466 U.S. at 689). The “principal
 24 concern” is “not whether counsel should have presented a mitigation case ... [r]ather, [the] focus
 25 [is] on whether the investigation supporting counsel’s decision not to introduce mitigating
 26 evidence of [defendant’s] background was itself reasonable.” *Wiggins v. Smith*, 539 U.S. 510,
 27 522-23 (emphasis in original).

28 *Strickland* and its progeny provide the federal law controlling claims of ineffective trial and

1 sentencing counsel. Following the AEDPA, the scope of this Court's review is limited to
2 ensuring that the California Supreme Court did not unreasonably or incorrectly apply *Strickland*
3 to the facts alleged in Petitioner's federal habeas application. Petitioner bears the burden of
4 proving the *Strickland* standard was not met. As discussed below, this Court finds that the
5 evidence that Petitioner accuses her counsel of withholding was not admissible in her case.
6 Consequently, Petitioner has not met her burden of showing that her counsel were incompetent
7 nor that she was prejudiced. Accordingly, the California Supreme Court did not unreasonably or
8 incorrectly apply *Strickland* in denying Petitioner's request for habeas corpus.

9 **B. Reasonableness of Counsel in Excluding BWS Evidence**

10 Petitioner asserts that her BWS defense stems from her history of abusive relationships,
11 particularly with a man named Marvin Pope who she claims coerced her throughout the incident
12 in Theodore Salanti's apartment. (Doc. No. 1 at 1). It is this history that she alleges could have
13 altered the outcome of her trial or mitigated her sentence. (Doc. No. 1 at 1). Petitioner points to
14 several instances where both trial and sentencing counsel should have reasonably been put on
15 notice of a viable BWS claim. (*See generally* Doc. No. 1).

16 Petitioner claims that her trial counsel, Terry Zimmerman, was on notice of the relationship
17 between Pope and Petitioner and that a "reasonable" attorney would have pursued a BWS claim.
18 (Doc. No. 8-9). Specifically, Petitioner notes Zimmerman's acknowledgment that Petitioner
19 attended counseling sessions on July 20 and 22, 2005, in which Petitioner discussed her
20 susceptibility to Pope's control. (Doc. No. 1 at 8). Petitioner claims that the outcome of the trial
21 may have been different had Zimmerman followed up on this knowledge and presented evidence
22 of BWS. (Doc. No. 1 at 9).

23 Petitioner also contends that her sentencing counsel, Elliott Kanter, likewise was
24 incompetent. Petitioner claims Kanter ignored recommendations to raise a BWS claim from the
25 doctor who conducted Petitioner's psychotherapy sessions. (Doc. No. 1 at 9). Petitioner also
26 points to Kanter's failure to present BWS evidence in light of the sentencing judge's request to
27 "digress" into Petitioner's credibility after expressing reservations about sentencing Petitioner to
28 life without the possibility of parole. (Doc. No. 1 at 10). Petitioner also references two letters

1 from jurors who expressed to the sentencing judge their belief that Petitioner's sentence was too
2 harsh. (Doc. No. 1 at 10).

3 In order to determine if counsel were ineffective, the Court must first examine whether
4 BWS evidence is relevant under Petitioner's circumstances. If relevant, then the Court must
5 determine whether such evidence would have been admissible. Only if the BWS evidence were
6 relevant and admissible could the Court consider whether Petitioner's counsel were ineffective
7 for not presenting it. Because the Court finds that Petitioner's potential BWS evidence is
8 irrelevant and inadmissible under California law, the Court finds that counsel were not
9 incompetent for failing to introduce it.

10 **1. Admissibility of BWS Evidence at Trial**

11 The California Supreme Court defines BWS as "a series of common characteristics that
12 appear in women who are abused physically and psychologically over an extended period of time
13 by the dominant male figure in their lives." *People v. Humphrey*, 13 Cal.4th 1073, 1083-84
14 (1996). The California Legislature codified the admissibility of BWS evidence in section 1107 of
15 the California Evidence Code, which allows a properly qualified expert to testify to BWS when:

16 (a) In a criminal action, expert testimony is admissible by either the prosecution or the
17 defense regarding intimate partner battering and its effects, including the nature and effect
18 of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims
of domestic violence, except when offered against a criminal defendant to prove the
occurrence of the act or acts of abuse which form the basis of the criminal charge.

19 (b) The foundation shall be sufficient for admission of this expert testimony if the
20 proponent of the evidence establishes its relevancy and the proper qualifications of the
expert witness. Expert opinion testimony on intimate partner battering and its effects shall
not be considered a new scientific technique whose reliability is unproven.

21 Section 1107 applies equally to the both trial and sentencing counsel. *See* Cal. Evid. Code § 300
22 (West 2012) ("[e]xcept as otherwise provided by statute, this code applies in *every* action before
23 the Supreme Court or a court of appeal or superior court ...") (emphasis added).

24 The admissibility of evidence showing the effects of BWS hinges largely on relevance.
25 *See People v. Gadlin*, 78 Cal.App.4th 587, 592 (2000). In *People v. Erickson*, 57 Cal.App.4th
26 1391, 1399 (1997), the court explained that BWS evidence is relevant: (1) to establish that the
27 defendant acted in self-defense; (2) to establish "imperfect self-defense"; or (3) to repair
28 defendant's credibility. (citing in part *People v. Day*, 2 Cal.App.4th 405, 415 (1992) (overruled

1 on other grounds by *Humphrey*, 13 Cal.4th 1073)). Evidence to repair credibility is admissible to
2 show that recantation of an abuse claim is common among victims of BWS. *People v. Brown*, 33
3 Cal.4th 892, 904 (1996). Thus, a victim of BWS can only establish relevance to mitigate
4 responsibility when the allegedly abusive partner is the victim of the crime charged.

5 The *Erickson* Court also explicitly rejected using BWS evidence to show a victim's intent
6 or thoughts at a given time. 57 Cal.App.4th at 1401. In *Erickson*, the court held that evidence of
7 syndromes like BWS should be admitted solely to disabuse jurors of "common sense"
8 misconceptions about the behavior of persons in affected groups and not to prove a fact in issue.
9 *Id.* The court held that "while [BWS] testimony may be admissible to explain how defendant's
10 asserted subjective perception of need to defend herself would reasonably follow from her
11 experience as battered woman, [an] expert is not permitted to testify as to expert's opinion that
12 defendant actually perceived that she was in danger and needed to defend herself." *Id.* at 1399.

13 Petitioner points to two cases where defense counsel's failure to introduce expert testimony
14 regarding BWS constituted ineffective assistance of counsel: *In Re Walker*, 147 Cal.App.4th 533,
15 538 (2007) and *Day*, 2 Cal.App.4th at 415. These two cases, however, involved defendants who
16 had killed their alleged abusers and, consequently, are inapposite here.

17 Accordingly, BWS testimony was not relevant in Petitioner's case and would not have
18 been admissible. Petitioner asserts that she wants to show that she was not wholly responsible for
19 her actions during the crime because Pope blackmailed her. This is not an acceptable use of BWS
20 evidence under *Erickson*. Petitioner is not claiming self-defense and, to the extent that she desires
21 to repair credibility, she is not recanting any prior claims of abuse. Petitioner's argument that
22 BWS evidence may be used to repair credibility generally, as she asserts in her Traverse,
23 improperly interprets the narrow use of BWS evidence in *Brown*.

24 Petitioner also wishes to use a BWS expert in support of a duress defense. (Doc. No. 18 at
25 40). BWS experts, however, may not testify to a defendant's state of mind. *Erickson*,
26 Cal.App.4th at 1401. Petitioner suggests in her Traverse that *Erickson* does not forbid counsel
27 from presenting experts to "testif[y] generally on BWS and its effects and giv[e] appropriate
28 hypotheticals" to aid the jury in "understanding Petitioner's mental processes as a BWS victim."

(Doc. No. 18 at 42). The Court disagrees. Such evidence speaks directly to Petitioner's state of mind and is not one of the three types of BWS evidence found relevant under *Erickson*. Under this analysis, no BWS evidence is admissible in Petitioner's case.

In her Traverse, Petitioner further contends that evidence of duress can be used, not as a defense to murder, but as a defense to the underlying felony in a felony-murder charge. (Doc. No. 18 at 39). This argument also fails. Although duress can be used generally as a defense in a felony-murder charge, it can only be used in certain circumstances. *Erickson*, Cal.App.4th at 1401. Petitioner cites *United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992), in support of her argument that BWS evidence can be used to show duress. In *Homick*, the Ninth Circuit noted that "[t]he battered woman defense is a species of the defense of duress." *Id.* The *Homick* Court also noted, however, that "the unique nature of battered woman syndrome justifies a somewhat different approach to the way we have historically applied [duress] principles." *Id.* In California, this "different approach" is reflected in *Erickson's* holding that BWS is only relevant in the three limited circumstances identified above. Petitioner's proffered use of BWS evidence falls outside of *Erickson's* limitations, and is therefore inadmissible. Accordingly, Petitioner's trial and sentencing counsel were justified in not pursuing a meritless claim.

2. Admissibility of BWS Evidence at Sentencing

As discussed above, in California, "[t]he meaning of relevance is no different in the context of mitigating evidence ... from what it is in any other context." *People v. Farley*, 46 Cal.4th 1053, 1128 (2009) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (internal quotations omitted)). Thus, "[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Id.*; see Cal. Evid. Code § 210 (West 2012).

Petitioner alleges that her sentencing counsel was ineffective, in part, for failing to present a BWS expert to mitigate her sentence. Because the "meaning of relevance is no different in the context of mitigating evidence," sentencing counsel's decision to not attempt to present a BWS witness at sentencing that could not have been presented at trial is not unreasonable.

Although this Court finds that neither trial nor sentencing counsel were unreasonable for

1 failing to pursue a BWS defense, Petitioner's claim can also be read to suggest that sentencing
2 counsel was deficient in failing to bring relevant mitigating evidence, that is, her relationship with
3 Mr. Pope, before the sentencing court. The record reflects, however, that the sentencing judge
4 was fully apprised of Petitioner's relationship with Mr. Pope and its connection to the crime for
5 which she was convicted.

6 Prior to Petitioner's testimony during sentencing, the following colloquy transpired
7 between Petitioner's sentencing counsel, Elliott Kanter, and the sentencing judge:

8 MR. KANTER: I know what she's going to say, basically.

9 THE COURT: It's up to you. I'm not pushing. It's a tactical decision on your
10 part.

11 ...

12 MR. KANTER: ... What she was going to talk about is [Pope's] involvement. I
don't think that helps. I don't know if it helps or hurts.

13 THE COURT: If [Pope] was the one that was there and part of it, which would not
14 probably surprise too many people, then if she wants to say that, then she's
welcome to say whatever she wants to say.

15 MR. KANTER: He wasn't there, but he set it up, is what she's going to say.

16 THE COURT: Can she prove it?

17 MR. KANTER: Personally that's the problem. We have talked ... I think it's a
18 real story. It makes sense.

19 THE COURT: I think that makes sense. It just makes as much sense that she
assisted [Pope] ...

20 (Lodgement 3 at 2234-36).

21 Petitioner then testified regarding Pope's involvement:

22 THE DEFENDANT: ... I was under duress. I was taking orders from somebody
23 else after everything happened. That's why [trial counsel] calls for me and stuff
like that, but it's taken me this long to realize this, that I had somebody in my life
24 that beat me, that burned me. I have marks. I have stories. I have so much stuff.

25 I denied it all to myself. I denied the fact that, you know, if I didn't do something
to please somebody, that they would beat me up.

26 ...

27 ... I was hiding the fact that I was trying to cover for someone else, trying to cover
28 my own feelings ...

...

1 I believe that maybe [Pope] knew that and set me up, and it hurts that he's free and
 2 I'm not.... I'm ashamed that I let somebody control me, which ultimately led to
 [Salanti] dying.

3 (Lodgement 11 at 2238, 2240–41).

4 This colloquy and Petitioner's testimony demonstrate that the sentencing court was
 5 presented with the facts supporting Petitioner's imperfect BWS defense. Indeed, Mr. Kanter
 6 demonstrates a certain skill by getting the underlying evidence before the sentencing judge
 7 despite the legal impediment to directly presenting BWS evidence in mitigation. There was no
 8 prejudice to Petitioner. The relevant facts were presented to the sentencing judge in a light
 9 favorable to Petitioner. Accordingly, Petitioner's counsel at sentencing was not ineffective.

10 **VI. CONCLUSION**

11 For the foregoing reasons, this Court recommends that Petitioner's Writ for Habeas be
 12 **DENIED.**

13 This report and recommendation will be submitted to the United States District Judge
 14 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1) (1988). Any party may
 15 filed written objections with the court and serve a copy on all parties by **March 16, 2012**. The
 16 document shall be captioned "Objections to Report and Recommendation." Any reply to the
 17 objections shall be served and filed by **March 30, 2012**.

18 The parties are advised that failure to file objections within the specified time may waive the
 19 right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153
 20 (9th Cir. 1991).

21 **IT IS SO ORDERED.**

22 DATED: February 24, 2012

23
 24 
 25 Hon. Mitchell D. Dembin
 26 U.S. Magistrate Judge
 27
 28